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## HIGH COURT OF CHHATTISGARH AT BILASPUR

## CRIMINAL APPEAL NO.1110 OF 2004

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| APPELLANT (In Jail) | | Guddu alias Maletry alias Omprakash |
| | Vs | |
| RESPONDENT | | State of Chhattisgarh. |

POST FOR ORDERS ON 21st November, 2007

Sd/-
DHIRENDRA MISHRA
Judge

20.11.2007

(61)

**HIGH COURT OF CHHATTISGARH AT BILASPUR**
**CRIMINAL APPEAL NO.1110 OF 2004**

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| **APPELLANT** (In Jail) | **Guddu alias Maletry alias Omprakash, son of Jagdish Vishwakarma, aged 25 years, Electrical Mechanic, resident of Village Gandhi Nagar, Ambikapur, District Sarguja (Chhattisgarh)** |
| **Vs** | |
| **RESPONDENT** | **State of Chhattisgarh.** |

**Present:**

Mr. J.S. Baraik, Advocate for appellant.
Mrs. Madhunisha Singh, Panel Lawyer for the State.

**J U D G M E N T**
**(Delivered on 21.11.2007)**

**Dhirendra Mishra, J:**

1. This appeal is directed against the judgment of conviction and order of sentence dated 23.11.2004 passed in S.T. No.30/2004 by the learned 1st Additional Sessions Judge, Ambikapur whereby the appellant has been convicted under Section 376 (1) of the I.P.C. and sentenced to undergo R.I. for 10 years and to pay a fine of Rs.1,000/-, in default of payment of fine to undergo additional R.I. for 6 months.

2. Case of the prosecution, in brief, is that the prosecutrix was residing with her parents in Azad Ward, Navapara, her mother was sick and was admitted in the hospital, whereas, her father is suffering from paralysis. On 24.11.2003 around 12.00 in the noon the prosecutrix (PW-4) with her friends Laxmi @ Laila (PW-5) & Parvati @ Bokhi (PW-6) together went towards the house of accused where the accused called her inside his home for giving food and when she entered his home, he raped her. She narrated about the incident to her friends and thereafter to her mother in the hospital and thereafter, the report was lodged vide Ex.P-6.

3. During investigation, the prosecutrix was sent for medical examination to the District Hospital, Ambikapur where Dr. (Smt.) S.P. Jaiswal (PW-1) examined her and gave the report of Ex.P-1 in which

she opined that the prosecutrix was subjected to rape. Her vaginal slides were prepared, which were seized vide Ex.P-15 and the same were sent for medical examination to the Forensic Science Laboratory, Raipur and the report of the FSL is Ex.P-18. However, the FSL report is negative.

4. After completing investigation, charge sheet was filed against the accused/appellant in the Court of Chief Judicial Magistrate, Ambikapur and the same was received by the Additional Sessions Judge for trial. During trial the prosecution has examined 9 witnesses in all and thereafter the statement of accused was recorded under Section 313 of the Cr.P.C. in which he denied the evidence appearing against him in the prosecution case and stated that he has been falsely implicated because there was dispute about the house when he resided as a tenant. He also examined defence witnesses namely Vimla (DW-1), Jagdish Vishwakarma (DW-2), Manmati (DW-3) and Bholi Soni (DW-4). Learned trial Court after hearing learned counsel for the respective parties, convicted & sentenced the appellant as mentioned above.

5. Conviction of the appellant is based on the statement of the prosecutrix (PW-4) and Dr. (Smt.) S.P. Jaiswal (PW-1), who has proved the medico legal report (Ex.P-1) of the prosecutrix.

6. Learned counsel for the appellant submits that the prosecutrix was examined thrice during trial. When she was examined for the first time on 15.6.2004, she has categorically stated that the accused did not do anything with her and she denied the contents of report of Ex.P-6 and stated that this report was in fact lodged by her step mother Shivkumari. Leading questions were put to her with the permission of the court by the prosecution, however, she stuck to her statement and denied that accused called her in his home for taking food and further denied that the accused committed rape with her. Her examination was deferred at the request of Additional Public

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Prosecutor and thereafter, she was examined on 2.9.2004. However, on that day no question was put to her by the Additional Public Prosecutor and in the cross-examination by the defence she has admitted that there was a quarrel between her step mother and the accused for rent, as the accused resided on rent in her house with his wife, daughters and father, her step mother had taken her to the police station after putting chilly powder in her vagina and in fact, her step mother had lodged the report. This witness was discharged after examination, however, on the application of the prosecution under Section 311 of the Cr.P.C. she was again summoned vide order dated 13.9.2004 and her statement was recorded on 19.10.2004. Before her third examination she was tutored by the police personnel, as she was in custody of the police and she has admitted in Para 32 & 33 of her deposition that the police came to her house to take her to the court and they tutored her as to what she has to speak and on account of fear of the police, as tutored by police, she has made allegation against the appellant on 19.10.2004, though on that date also she has admitted that her step mother had quarreled with the accused for rent and therefore, she forcibly took her to the police station for lodging the report. She has also admitted that before taking her to police station her step mother had put chilly powder in her vagina. On 19.10.2004 the prosecutrix has admitted that when she went to the house of accused, his wife and two children were present in his home. None of the independent witnesses namely Laxmi @ Laila (PW-5) & Parvati @ Bokhi (PW-6), who have allegedly accompanied the prosecutrix, have not supported the case of the prosecution, they have turned hostile and the prosecution has not been able to elicit anything in their cross-examination. However, the trial court relying upon the statement of prosecutrix recorded on 19.10.2004 and on the basis of the report of Ex.P-1 of the doctor has convicted the appellant.

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7. On the other hand, learned counsel for the State has supported the impugned judgment and argued that the prosecutrix is a minor girl aged about 12-13 years. On 15.6.2004 after her examination she started weeping as she was frightened that after the accused is released from the jail, he shall be beating her and only when she was given police protection on 19.10.2004 she could depose freely. Her version is duly corroborated from the statement of Dr. (Smt.) S.P. Jaiswal (PW-1) who has proved the medico legal examination report of the prosecutrix Ex.P-1. Even the defence witness No.1-Vimla, wife of accused, has admitted that the prosecutrix was raped and her statement can be recorded by inducing or threatening her, as she is an orphan.

8. I have heard learned counsel for the parties. I have perused the impugned judgment and the record of court below.

9. From perusal of the statement of the prosecutrix (PW-4) it is noticed that she was examined for the first time on 15.6.2004, however she did not support the case of the prosecution and she was declared hostile. In the cross-examination also she did not give any evidence against the appellant and on the contrary she has stated that her step mother Shivkumari had quarreled with the appellant, as he was her tenant and did not pay the rent and she forcibly took her to the police station for lodging the report. Her evidence was deferred at the request of Additional Public Prosecutor, however, while leaving the witness box she started weeping and stated that the brother of the accused was telling that after release of Guddu, both of them shall beat her and kill her. She also stated that because of the above fear she was not telling the truth and therefore, she was again examined on 2.9.2004. In the cross-examination by the defence she claimed that before taking her to police station her step mother had put chilly powder in her vagina and took her to the police station while beating her. Thereafter, on the application of the prosecution under Section 311 of Cr.P.C. she was again examined on 19.10.2004 and on

this day she claimed that she is deposing without any fear, as no one has threatened her nor anyone has induced her and thereafter she stated that she does not know the accused, her father died in the summer, whereas, her mother died at the end of winter season. Her father was suffering from paralysis. She further stated that incident happened in the house of accused when she along with Laxmi and both the daughters of the accused went there. She has also stated that after putting his finger in her vagina the accused inserted his male organ as a result of which blood started oozing and it was painful. She went to lodge the report with her step mother. On that day also in the cross-examination she has admitted regarding quarrel of her step mother and the accused and in fact, Shivkumari had forcibly taken her to the police station and she lodged the report, as asked by Shivkumari. On this day she has also admitted that Shivkumari had put chilly powder in her vagina and thereafter taken her to police station, though she has claimed that the accused had raped her. From her statement it is also clear that she was brought in the court by the police on that date and she has further admitted that the police personnel had explained her as what she has to depose. She has further stated that when she went to the house of accused his wife and two children were also present in the house.

10. The other two witnesses, who accompanied the prosecutrix, as per prosecution case, namely Laxmi @ Laila (PW-5) & Parvati @ Bokhi (PW-6) have not supported the case of the prosecution and they have turned hostile. In their lengthy cross-examination they have not stated anything against the accused and the prosecution also could not elicit anything incriminating against the appellant. On the contrary Laxmi (PW-5) has stated that the prosecutrix had told her that her mother forcibly made her to lodge report by beating her.

11. After carefully examining the statement of prosecutrix, I am of the considered opinion that her statement is full of contradictions & inconsistencies, though she has stated that on the date of her first

examination she was frightened and therefore, she was not speaking truth. However, on the next date of evidence i.e. on 2.9.2004 also she did not speak anything against the appellant and she was discharged after examination and thereafter she was again examined on 19.10.2004 on the application of the prosecution. If we carefully examined the statement of the prosecutrix on 19.10.2004 also, her evidence does not inspire confidence as on that date also she has given contradictory version because at one place she states that she does not recognize the accused and on the same breathe she claims that she was raped by the accused. She has also stated that she was made to lodge report by her step mother Shivkumari, as she forcibly took her to the police station after putting chilly powder in her vagina and on the same breathe she again states that whatever report was lodged in the police station, she did so of her own. There is evidence that she came with the police for giving statement in the court and she has also stated that the police had tutored her as to what she has to speak. In these circumstances, I am of the considered opinion that the version of the prosecutrix does not inspire confidence.

12. So far as her medical examination report of Ex.P-1 is concerned, the doctor has given positive finding that her vagina had torn in 3°clock position and an attempt of rape has been made. However, taking into consideration the statement of the prosecutrix that there is quarrel between her step mother and the accused for rent and therefore, she forced her to lodge the report and took her beating to the police station for lodging the report after putting chilly powder in her vagina, it would not be safe to convict the appellant on the basis of contradictory statement simply because her subsequent statement is corroborated from the medical evidence. Other witnesses i.e. Laxmi @ Laila (PW-5) & Parvati @ Bokhi (PW-6), who allegedly accompanied the prosecutrix on the date of incident to the house of accused, have stated in their cross-examination that the prosecutrix told her that her mother forced her to lodge the report against the applicant. She

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has also admitted that when she went to the house of accused, his wife and two daughters were present in the home and therefore, committing rape at 12.00 noon in presence of wife and two daughters is highly improbable. The trial court has heavily relied upon the version of Vimla (DW-1), wife of accused, who has stated that the prosecutrix was raped, however, the version of Vimla in this regard in no way corroborates the statement of the prosecutrix, as she has also stated that she along with her daughter and father-in-law reside in the same home and on the relevant day also they were present in the home.

13. It is a settled law that suspicion, howsoever, grave may be, cannot take place of proof as there is a long distance between "may be" and "must be" and presumption of innocence is available to the accused. Thus in view of the aforesaid discussions and having regard to the evidence available on record, I am of the considered opinion that the judgment of conviction and order of sentence passed by the learned Additional Sessions Judge against the appellant cannot be sustained and the same is liable to be set aside.

14. In the result, appeal succeeds. The appellant is acquitted of the charge leveled against him and he is directed to be set at liberty forthwith if not required in connection with any other offence.

Sd/-
DHIRENDRA MISHRA
Judge

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